No. 2687

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

INMAN, POULSEN LUMBER COMPANY,
a corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Clarence L. Reames, United States Attorney for Oregon, and John J. Beckman, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Plaintiff in Error.

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JAMES, KERNS & ARBOTT CO., PORTLAND, ORE

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STATEMENT.

This is an action to recover the value of timber alleged to have been cut from government land by one Stanley and purchased by the defendant. It is from an order sustaining a demurrer to the sufficiency of the complaint that this appeal is taken.

The complaint alleges that by an Act of Congress approved July 2, 1864, the land from which the timber in question was cut became vested in the Northern Pacific Railroad Company by reason of the definite location of its railroad opposite the said land on September 22, 1882, and the subsequent issuance of a patent thereto. That thereafter and on July 1, 1898, Congress passed an Act providing for a relin-

quishment by the Railroad Company to the United States of certain lands within the grant of 1864, which had been disposed of by the Government or were occupied by settlers prior to January 1, 1898, and other lands taken in place thereof; that an acceptance of the provisions of the Act was thereafter filed by the Railroad Company, and that in compliance with the Act the Railroad Company relinquished the land in question after the Secretary of Interior had furnished the Railroad Company with a list of lands for relinquishment, which list was made May 2, 1905, by executing and delivering to the Government a quitclaim deed, which deed was dated the 5th of August, 1907, and accepted by the Government January 3, 1908.

The complaint then alleges that by reason of the acceptance of the said Act of July 1, 1898, by the Railroad Company, the title to the said land became vested in the Government as of date July 1, 1898, and that thereafter the same was public land of the United States; that on January 28, 1908, the homestead application of William N. Stanley was allowed by the Land Office for the said land by virtue of a claim of settlement of the said Stanley as an actual bona fide settler from and after the year 1891; that during the time the said Stanley claimed to occupy the said land as a bona fide settler, to-wit, during the years 1900, 1901, 1902 and 1903, the said Stanley and others wrongfully and unlawfully cut and removed from the said lands large quantities of timber for sale and speculation and not in the course of clearing and improving said land; that the said timber was cut and removed and sold to the Inman, Poulsen Lumber Company without the knowledge or consent of the Northern Pacific Railroad Company, or its

successors or assigns in interest, and without the knowledge or consent of the United States.

ARGUMENT.

This is an action in trover, and before the plaintiff in error can recover, it must show general or special property in the timber cut and its right to the possession thereof at the time of the bringing of the action. (United States v. Loughrey, 172 U. S. 206.) Not only does the complaint fail to show such property and right of possession, but it affirmatively appears therefrom that such property and right of possession was in the Northern Pacific Railroad Company.

The title to the land became vested absolutely in the Northern Pacific Railroad Company under the grant of 1864, immediately upon the location of the railroad of the said Company, and the filing of the map of the location thereof made the title and ownership of said land a matter of public record. This occurred in September, 1882. In addition to this a patent issued to the Northern Pacific Railroad Company in May, 1895. The land in question being within the place limits of the grant, the said grant was a grant in praesenti and upon the filing of the map showing the location of the Company's railroad, title thereto became vested as of the date of the grant. (United States v. Loughrey, 172 U. S. 206; Schulenberg v. Harriman, 21 Wall. 44).

The title to the land having become vested in the Northern Pacific Railroad Company, was this title ever divested and revested in the Government so as to give the Government the right to maintain this

action? It is the Government's contention that the interest of the Railroad Company in this land immediately terminated and became vested in the United States upon the acceptancy by the Railroad Company of the Act of July 1, 1898. This Act was passed for the purpose of settling disputes arising out of conflicting rulings of the Land Department in reference to the Eastern terminus of the Railroad, and provides substantially as follows:

That where prior to the 1st day of January, 1898, land of the Northern Pacific Railroad Company secured under any Government grant "has been purchased directly from the United States or *settled upon or claimed in good faith* by any qualified settler under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and where the purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest shall be entitled to select in lieu of the land relinquished an equal quantity of public lands . . . ."

The Act makes it the duty of the Secretary of the Interior to ascertain from time to time and cause to be delivered to the Railroad Company as soon as conveniently may be done, a list of lands which have been settled or occupied by bona fide settlers. "And all right, title and interest of the said Railroad grantee, or its successors in interest, in and to any of such tracts, which the said Railroad grantee, or its successors in interest, may relinquish hereunder, shall revert to the United States, and such tracts shall be treated under the laws thereof in the same manner as if no rights thereto had ever vested in the said Railroad grantee, and all qualified persons who have

occupied and may be on said lands as herein provided, or who may have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their title to said lands, according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company, or its lawful successor in interest, may proceed to select; in the manner herein provided, lands in lieu of those relinquished, and patents shall issue therefor."

This Act, together with the acceptance of the provisions thereof by the Railroad Company did not of itself operate to divest the Company of the title to the land in question; first, because the said Act does not apply to the case at bar, as Stanley was not a settler in good faith; second, because certain executive action was necessary before the Act could be put into operation, namely, the preparation and delivery to the Railroad Company a list of lands to be relinquished by it.

FIRST: Irrespective of the effect of the Act in some cases, it has no application here, since the land in question does not come within the provisions thereof. The Act clearly provides that the Railroad Company may relinquish lands to the Government where these lands have been "settled upon or claimed in good faith by any qualified settler under color of title or claim of right." What constitutes good faith within the meaning of the Act?

In the first place, good faith implies lack of notice of a prior right. A homesteader is not a settler or claimant in good faith who knows that the land claimed is owned by another than the Government. The

record title is constructive notice of such ownership and actual notice is not necessary. (Walden v. Knevals, 114 U. S. 373.) The record showed title in the Railroad Company upon filing the map of the definite location of the Railroad which occurred nine years before the alleged bona fide settlement of Stanley. At that time there was a complete record title in the Railroad Company, which was notice to all the world. Under such circumstances there could be no bona fide purchase from the Government or settlement under the homestead laws.

As a further illustration of the importance of the state of the record title to the said lands at the time of the alleged trespass, it is well to bear in mind not only that the existence of this record was constructive notice to the settler, but was also notice to the defendant in error that the land and timber was not public property.

The purpose of the Act of 1898 is set forth with considerable minuteness in the case of Humbird v. Avery, 195 U. S. 506. It appears that some controversy arose as to the eastern terminus of the Northern Pacific Railroad. The Company claimed Ashland to be that terminus and the Secretary of the Interior so ruled. Later the Secretary changed his ruling and held Duluth, not Ashland, to be the terminus, and that, therefore, the grant of 1864 did not embrace any lands between these two cities. The Company's selections within the indemnity limits between these cities were cancelled by the Secretary and the lands thrown open to sale and entry by the United States. Relying upon this ruling, certain persons filed upon certain of the lands between Duluth and Ashland which, under the former ruling of the Secretary would

have been within the indemnity limits of the Railroad grant. These settlers acting in good faith had gone upon the land to settle them and the controversy which arose between the Government, the Railroad Company and the settlers resulted in the Act of 1898. Shortly before the passage of this Act, the Supreme Court of Wisconsin held contrary to the ruling of the Secretary of the Interior, which decision was affirmed by the United States Supreme Court, that Ashland and not Duluth was the Eastern terminus of the Northern Pacific Railroad. In this case the Act of 1898 was held to apply. We have gone into this detailed statement of the conditions that led up to the passage of this law and the reasons therefor to show that the words "good faith" therein used were for a purpose, and that these words should be construed in the light of the purpose of the legislation.

In the case we have just referred to the settler had a right to rely upon the ruling of the Interior Department, and he made his settlement in view of this ruling and as no title to the land had ever been vested in the Northern Pacific Railroad Company, he was held to be a bona fide settler. What a vast difference between that case and the one at bar! In one case there was a substantial dispute between the claimants for which the Act was intended to provide a means of settlement. In the case at bar there was and could be no question of the validity of the relative claims of the Railroad Company and Stanley. The latter acquired no right under his alleged settlement on the land since he did not make that settlement in the belief that the land was public domain, but with the knowledge that it was the property of the Railroad Company. Stanley was a mere trespasser

Further to the effect that the "good faith" of the settler is a condition precedent to the application of the statute, we quote from Humbird v. Avery, page 506:

> " * * * The statute embraces both patented and unpatented lands, in respect of which the Railroad company or its successor in interest claims that a right thereto attached by the definite location of its road or by selection; *provided, they are also such lands as were originally purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title.* * * * "

The Department of the Interior recognized the importance of the bona fides of the settlement of the homesteader, to make the Act operative, as shown by an opinion of Acting Secretary Ryan, dated July 20, 1906, 35 L. D. 49, wherein he said:

> "It is the opinion of this Department that the question as to whether the title to the lands involved can be fairly considered as being 'in dispute' at the date of the passage of the Act and at the time the individual claim must have been initiated, to-wit, January 1, 1898, determines the applicability of the Act of July 1, 1898, rather than the basis of the Railway Company's claim."

In this connection it is well to note the statement of counsel for the appellant that the Court in the Humbird v. Avery case held that the Act applied to lands which had been patented prior to its passage as well as to unpatented lands *claimed by the Railroad Company* and that the vested rights of the Railroad

Company by reason of the patent would not enable it to alienate or in any way dispose of its right before the Secretary of the Interior had filed his list of selection under the Act. The facts and language of the case do not justify any such conclusion. Patents had been issued to certain of the lands in dispute to the individual "settlers or purchasers" and the Act was held to apply to these lands notwithstanding patent had issued. As to the Railroad Company, no patent had ever issued. The selections which it had made were not even approved by the Secretary of the Interior.

Nor can it be successfully maintained that the furnishing of a list of lands to be relinquished by the Secretary of the Interior was conclusive upon the Railroad Company as to the good faith of the settler. Section 3 of the Act provides that the list of lands to be relinquished by the Secretary of the Interior shall be "conclusive with respect to the particular lands to be relinquished." This language should be construed to refer to lands to be relinquished which had been settled in good faith. Attention is especially called to the fact that the list furnished by the Secretary of the Interior is not to be conclusive on the Railroad Company with respect to the bona fides of the settlement. The good faith of the homesteader is referred to many times in the Act and it is therefore clear that the bona fides of the settlement is the very basis upon which disputes were to be settled, and a condition precedent to the conclusiveness of the listings for relinquishment by the Secretary of the Interior. If the Act of 1898 could not apply to the land in question, because of the lack of good faith on the part of Stanley, then the acceptance of its provisions by the Railroad Company could not possibly operate to

divest the Company of its title to the said land, or its right to the timber growing thereon.

SECOND: Assuming, however, that the Act is applicable and that the action of the Secretary of the Interior is conclusive as to the bona fides of the settlement of Stanley, yet the mere passage of the Act and the acceptance thereof by the Railroad Company did not of itself operate to divest the Company of its title and revest the same or the right of possession in the United States. Certain action on the part of the Secretary of the Interior in listing the property which had been settled was necessary before the Company could be required to relinquish. The complaint shows that the land in question was not listed by the Secretary of the Interior for relinquishment under the Act until May, 1905, seven years after the passage of the Act, and more than a year after the last timber was cut, and it was not until August, 1907, that the Railroad Company executed its quitclaim deed to the land in favor of the Government.

Since the Railroad Company had the absolute title to the land and the right of immediate possession thereof at the time the timber was cut, it alone, or one to whom the right had been duly assigned, could maintain an action for the cutting. The complaint does not allege that the right of action of the Railroad Company for the removal of the timber was ever assigned to the United States.

The principle here involved was clearly announced in the case of the United States v. Loughrey, 172 U. S. 206. The facts in that case were very similar in many respects to the one at bar. It was an action by the United States to recover the value of timber

cut from land in Michigan. It was charged that the timber had been cut by one Sauve and sold to the defendant Loughrey. The land was within a grant to the State of Michigan made in 1856 to aid in the construction of a railroad within the state. It was provided in the granting Act that all lands then unsold should revert to the United States if the railroad was not completed within ten years. In 1889, one year after the timber was cut, Congress passed an Act forfeiting the lands in question on account of failure to complete the railroad within ten years. The court held as follows:

1—That the grant of Congress in conformity with the holding in Schulenberg v. Harriman, 21 Wall. 44, was a grant in praesenti of title to the odd sections to be afterwards located, and that upon the definite location of the railroad the title in the grantee became absolute.

2—That the United States having no title to the land and no right to the possession of the timber at the time of the trespass, could not maintain an action for the timber cut. In this connection the court says:

> "The plaintiff is bound to prove a right of possession in himself *at the time of the conversion*, and if the goods are shown to be in the lawful possession of another by lease or similar contract, he cannot maintain trover for them."

3—That a subsequent vesting of title in the Government did not give it the right of action for timber cut while the title and right of possession was in another. In this connection, the court said:

> "Neither a deed of land nor an assignment of a patent for an invention carries with it a right of action for prior trespass or infringement. Such rights of action are, it is true, now assignable by the statutes of most of the states, but they only pass with the conveyance of the property itself where the language is clear and explicit to that effect."

The application of this last mentioned principle to the case at bar is clear. It is not alleged in the complaint that the right of action of the Railroad Company, if it had one, was ever assigned to the Government, nor is it alleged that the relinquishment and deed of the Railroad Company attempted by the language used to pass this right. The right then is with the Company alone (Schulenberg v. Harriman, 21 Wall. 44).

Referring to the second holding of the court in the Loughrey case, to-wit, that the United States did not have the title or right of possession sufficient to maintain an action of trover, we quote (page 216):

> "The fact is that nothing remained of the original title of the United States but the possibility of a reversion, a contingent remainder, which would be an insufficient basis for an action of trover."

The application of this principle to the facts of the case at bar is evident. At the time that Stanley cut the timber, the United States had only a contingent interest in the land,—a reversionary interest which might or might not ripen into an absolute title and right of possession, the contingency being the action

of Stanley under the Act with reference to his right to retain his claim and the listing of the same by the Secretary of the Interior for relinquishment by the Railroad Company. This contingent or reversionary interest in the land did not affect the legal title in the Railroad Company, nor did it give the United States the possession or the right of possession of the land, and, as we have already seen, before an action of trover can be maintained, there must be title and the possession, or the right of possession, in the Government at the time of the trespass.

The right of posession did not pass until it was finally determined that the Railroad Company would be called upon to relinquish in favor of Stanley. This was determined only upon the election of Stanley to retain the land and the listing thereof by the Secretary of the Interior. Prior to that time the title and right of possession of the Railroad Company was absolute, and could only be defeated by the bona fide settlement of Stanley and his election to hold the land as a homestead. Prior to that time the United States had no more right to enter and take possession of the land than they would have to take possession of the property of a private individual.

There is nothing in the Act itself to give the United States a right of possession or the right to maintain an action for timber cut under the circumstances of this case. The following language cannot be construed to confer any such right:

> "All right, title and interest (which the railroad grantee may relinquish) shall revert to the United States, and such tract shall be treated under the laws thereof in the same manner as

if no rights thereto had ever vested in the said railroad grantee."

The evident purpose of this language was to divest the Railroad Company of all title to any land coming under its operation as though no title had ever been in the Company, so that all bona fide settlers would have the same rights and the homestead laws would operate in the same manner as though the title had always been in the Government. If the above language were to be construed to confer upon the Government the right to maintain actions for trespass committed after the passage of the Act and before actual relinquishment, it must also be construed to apply to trespass committed before the passage of the Act, for if applying in one instance it is broad enough to apply in the other. Indeed, if the language is to be construed to apply to anything other than the mere naked title to the land and a strict construction is to be placed upon the words used "and such tract shall be treated in the same manner as if no rights thereto had ever vested in the railroad grantee," then the Railroad Company itself would be answerable for all timber which it may have cut from its own land prior to the passage of the Act. The error of such a construction is apparent from the absurd conclusions to which it leads.

The burden of the Government's contention is that title to the land having finally been perfected in the United States, that title by the law of relation became vested as of the date of the acceptance of the Act by the Railroad Company, and that such title carried with it the right to recover for timber cut between the time of the acceptance of said Act and the perfecting of said title.

Reliance is placed upon two cases, Knapp v. Alexander Company, 237 U. S. 162, and Peyton v. Desmond, 219 Fed. 1. It was here held that the title of a homesteader under our homestead laws after title had been perfected in him, related back as of the date of his filing, and that under these circumstances he had such inchoate title after his filing as to give him a right of action for timber cut between the time of his said entry and the granting of the patent. This principle has long been established and is based upon the theory that the one in possession, or the one having the right of possession, under our homestead laws may maintain an action in trover. The homesteader upon filing upon land, has the right to the immediate possession thereof. The right of possession at the time of the removal of the timber coupled with his subsequent acquisition of the title gives him this right of action.

These cases, however, widely differ from the case at bar, even though we assume that the law of relation applies. The initiatory act in this process whereby the title to the land in question was to become vested in the United States was the acceptance by the Railroad Company of the Act of 1898. This title was finally perfected by the giving of a deed. Did this initiatory act of itself vest in the United States the title, possession or the right of possession to the land in question? As between the Railroad Company and the Government, that right was with the former. The distinction between the cases cited by the appellant and the one at bar is clearly set forth by the court in the case of the United States v. Loughrey. After citing several cases similar to those cited by counsel where the law of relation applied, it was pointed out that there was some limitation upon the

application of the doctrine. On page 219, the court said:

> "These actions are distinguishable from the one under consideration in the fact that the plaintiffs had an inchoate title to the land—a title which no one could disturb, and which the state was bound to perfect by the issue of a patent provided the plaintiffs followed up their application. We do not think the doctrine of these cases ought to be extended."

However, let it be assumed for the sake of argument that the principle for which appellant contends does apply to this case so as to revest the title to the land as of the date of the acceptance of the Act. Yet it does not follow that the revesting of the title in the United States carries with it the right to maintain this action. Again we quote from the case of United States v. Loughrey, page 217:

> "But conceding all that is contended for by the plaintiff with respect to the revestitute of the title to the lands by this Act, it does not follow that the title to the timber which had been cut in the meantime was also revested in the United States. As was said in Schulenberg v. Harriman, the title to the timber remained in the state after it had been severed, but it remained in the state as a separate and independent piece of property, and if the state had elected to sell it, a good title would have thereby passed to the purchaser, notwithstanding the subsequent act of forfeiture. It did not remain the property of the state as a part of the land, but as a distinct piece of property, al-

> though the state took its title thereto through and in consequence of its title to the lands. From the moment it was cut, the state was at liberty to deal with it as with any other piece of personal property."

Appellant places much reliance upon the case of Humbrid v. Avery as an authority upon the question of the right of the Railroad Company to convey lands which come under the purview of the Act of 1898 after the acceptance of its provisions by the Company. The court in that case did say that the Railroad Company should not be allowed to defeat the operation of the Act by deeding these lands after its acceptance by the Company. This case, however, differs from the one at bar in the following important particulars:

1—It was a suit in equity to have the plaintiff adjudged to be the owner in fee of the land in question, and referred only to the question of the title and did not decide the question of the right of possession thereof after the acceptance of the Act.

2—The conveyance was made the next day after the acceptance of the Act and before any opportunity was given to put the same into operation by the Secretary of the Interior. Under these circumstances the suit was held to be premature. (Page 510.)

3—The title to the land in question was never vested in the Railroad Company. The land was within the indemnity limits and selections within these limits had never been approved by the Secretary of the Interior. It has uniformly been held that as to lands within indemnity limits no title is acquired by

the grantee until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior.

> Wisconsin Central Railway Company v. Price Company, 133 U. S. 496.
>
> Daniels v. Wagner, 205 Fed. 239.
>
> Sjoli v. Drechel, 199 U. S. 565.

On this question, the court in Humbrid v. Avery said:

> "This conclusion is fortified, if not absolutely demanded, by another consideration, namely, that no title to indemnity lands is vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established. * * * Now, the lands here in dispute and claimed by the plaintiffs as grantees of the Northern Pacific Railway Company (the alleged successor in interest of the Northern Pacific Railroad Company) are lands admittedly within indemnity as distinguished from granted or placed limits. The mere filing of lists of selections after the acceptance of the map of definite location of the railroad lands between Duluth and Ashland gave the company no such title as could be enforced by the courts in a suit between private parties. * * * ."

For the reasons which we have just noted, the principle announced in the case of Humbrid v. Avery can hardly be considered applicable to the case at bar. In the former case, the Railroad Company

never did have the title or the right to possession of the land in question, and certainly could not convey any title to Humbird. It is important also to note that the Railroad Company attempted to convey this land by deed immediately after the acceptance of the Act by it without giving the Secretary of the Interior any opportunity to carry out the provisions of the Act. In the case at bar, seven years elapsed before the Secretary of the Interior took any action toward listing the land in question for relinquishment, and it would seem as an abstract question of justice and right where the rights of innocent third parties are involved that the United States should be estopped on account of its own laches from now maintaining this action.

This is an action in trover to recover the value of timber converted. This action can be maintained only by one who either had the title or the right of possession at the time of the conversion. The complaint in this case does not show that the title to the land in question, or the right to the possession thereof, was vested in the appellant at the time of the conversion, but rather does the complaint show that the fee simple title to the land was vested in the Northern Pacific Railroad Company subject to be defeated upon the happening of a contingency, and as between the Railroad Company and the Government the right of possession was in the former.

Further, the complaint fails to state a cause of action against this respondent for the reason that it appears therein that the Act of July 1st, 1898, has no application to the land in question from which the timber was cut for the reason that Stanley was not a

settler prior to January 1st, 1898, in good faith under color of title.

The respondent therefore respectfully submits that there was no error in the judgment of the District Court in sustaining respondent's demurrer to appellant's complaint.

Respectfully submitted,

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